

Message Text

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E.O. 11652:

TAGS:ETRD, EINV, JA

SUBJECT: U.S.-JAPAN FRIENDSHIP, COMMERCE
NAVIGATION FCN TREATY

1. THE DEPARTMENT HAS BEEN REQUESTED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) TO PROVIDE AN INTERPRETATION OF THE 1953 FCN TREATY WITH JAPAN TO ASSIST THE EEOC IN PREPARING AN AMICUS BRIEF FOR THE CASE OF AUIGLIANO V. SUMITOMO SHOJI AMERICA, INC., CURRENTLY PENDING IN THE SOUTHERN DISTRICT OF NEW YORK.

2. SECRETARIAL EMPLOYEES OF SUMITOMO, A NEW YORK CORPORATION (WHOLLY-OWNED BY SUMITOMO SHOJI JAPAN) HAVE BROUGHT SUIT UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT, CLAIMING SEX AND NATIONAL ORIGIN DISCRIMINATION IN THE COMPANY'S HIRING, PROMOTION AND TRAINING PRACTICES. THE COMPANY HAS

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ANSWERED THAT THE FCN TREATY WITH JAPAN GIVES IT AN EXEMPTION FROM AMERICAN CIVIL RIGHTS LAWS IN FILLING ITS MANAGEMENT POSITIONS.

3. THE POSITION THE DEPARTMENT TAKES IN THIS CASE MAY HAVE BROAD IMPLICATIONS FOR AMERICAN BUSINESSES OPERATING IN JAPAN UNDER THE FCN TREATY, AND POSSIBLY FOR AMERICAN

BUSINESSES IN ALL COUNTRIES WITH WHICH THE U.S. HAS FCN

TREATIES CONTAINING PROVISIONS SIMILAR TO THOSE IN THE JAPANESE TREATY.

4. THE KEY PROVISION OF THE FCN TREATY IN ISSUE IS ARTICLE VIII, PARAGRAPH 1. IT PROVIDES IN PART THAT: "NATIONALS AND COMPANIES OF EITHER PARTY SHALL BE PERMITTED TO ENGAGE WITHIN THE TERRITORIES OF THE OTHER PARTY, ACCOUNTANTS AND OTHER TECHNICAL EXPERTS, EXECUTIVE PERSONNEL, ATTORNEYS, AGENTS, AND OTHER SPECIALISTS OF THEIR CHOICE." DEFENDANTS (SUMITOMO) ARGUE THAT THIS ARTICLE GIVES THEM THE RIGHT TO HIRE WHOMEVER THEY CHOSE IN TREATY-TRADER POSITIONS. PLAINTIFFS (THE SECRETARIAL EMPLOYEES) ARGUE THAT THAT THE RIGHT IS CONDITIONED BY THE 1964 CIVIL RIGHTS WHICH FORBIDS DISCRIMINATION ON THE BASIS OF SEX AND NATIONAL ORIGIN.

5. DEPARTMENT WOULD APPRECIATE YOUR ASSISTANCE IN PROVIDING ANY INFORMATION YOU MAY HAVE CONCERNING JAPANESE PRACTICE WITH REGARD TO THIS PROVISION OF THE FCN TREATY. SPECIFICALLY, WE ARE INTERESTED IN KNOWING

A) HOW DOES GOJ ACCOMMODATE REQUESTS BY AMERICAN BUSINESSES TO EMPLOY AMERICAN NATIONALS AS TREATY TRADERS WITHIN JAPAN?
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B) WHAT CONDITIONS, IF ANY, ARE PLACED ON THE RIGHT OF U.S. BUSINESSES OPERATING IN JAPAN TO HIRE EXECUTIVE PERSONNEL OF THEIR CHOICE?

6. WHAT WOULD BE THE EFFECT, IF ANY, ON AMERICAN BUSINESSES IN JAPAN IF:

A) THE TREATY WERE INTERPRETED TO DISTINGUISH BETWEEN AMERICAN BUSINESSES OPERATING THROUGH BRANCH OFFICES AND THOSE DOING BUSINESS THROUGH LOCAL SUBSIDIARIES, ACCORDING AN ABSOLUTE RIGHT TO ENGAGE AMERICAN NATIONALS AS TREATY TRADERS ONLY TO AMERICAN COMPANIES OPERATING THROUGH BRANCH OFFICES?

B) THE TREATY WERE INTERPRETED TO PROVIDE A "RIGHT OF CHOICE" SUBJECT TO THE REQUIREMENT THAT AMERICAN BUSINESSES (WHETHER THROUGH BRANCH OR SUBSIDIARY) GIVE EQUAL CONSIDERATION TO LOCAL CITIZENS AS WELL AS AMERICAN NATIONALS WHEN FILLING POTENTIAL TREATY TRADER JOBS

POSITIONS IN THE HOST COUNTRY?

7. HAS THE GOJ ADOPTED A POSITION ON HOW THIS PROVISION

SHOULD BE INTERPRETED? EMBASSY MAY WISH TO CONTACT INFORMALLY APPROPRIATE GOJ OFFICIALS TO SOUND THEM OUT ON THIS SUBJECT.

8. WE WOULD ALSO LIKE TO KNOW IF ANY ACTIONS HAVE BEEN TAKEN IN RESPONSE TO A NOVEMBER, 1975 INSPECTORS MEMORANDUM NOTING DIFFERENCES BETWEEN JAPANESE AND AMERICAN PRACTICE IN ISSUING TREATY TRADER (E) VISAS. (INSPECTORS MEMORANDUM NO. 3, "THE CONDUCT OF RELATIONS WITH JAPAN," POST: TOKYO AND CONSTITUENT POSTS, AT P. 3).

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THE MEMORANDUM STATES THAT THE JAPANESE PLACE NUMERICAL LIMITATIONS UPON THE NUMBER OF TREATY TRADERS AMERICAN FIRMS MAY BRING TO JAPAN, IT ALSO STATES THAT THE JAPANESE REFUSE TO ISSUE TREATY TRADER VISAS TO AMERICANS DOING BUSINESS IN JAPAN AS SOLE PROPRIETORS AND TO EMPLOYEES OF AMERICAN-OWNED JAPANESE COMPANIES. ARE THESE OBSERVATIONS STILL CORRECT? IF SO, HAS AMERICAN PRACTICE BECOME MORE RESTRICTIVE TO PARALLEL JAPANESE PRACTICE? HAVE ANY DISCUSSIONS WITH JAPANESE TAKEN PLACE ABOUT THIS ISSUE?

9. DEPARTMENT WOULD APPRECIATE YOUR RESPONSE AS SOON AS POSSIBLE SINCE DEPARTMENT FACES TIGHT SCHEDULE IN RESPONDING TO EEOC REQUEST FOR OPINION. VANCE

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